



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-048

The Pampered Chef, Canada
Corporation

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, February 13, 2008*

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IN THE MATTER OF an appeal heard on September 26 and 27, 2007, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated September 27, 2006, with respect to a request for re-determination under section 60 of the *Customs Act*.

BETWEEN

THE PAMPERED CHEF, CANADA CORPORATION

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Dates of Hearing: September 26 and 27, 2007

Tribunal Members: Pierre Gosselin, Presiding Member
Ellen Fry, Member
Meriel V. M. Bradford, Member

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STATEMENT OF REASONS

1. This is an appeal under section 67 of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), concerning the value for duty of goods imported by The Pampered Chef, Canada Corporation (Pampered Chef Canada) from The Pampered Chef, Ltd. (Pampered Chef U.S.A.) under a national customs ruling.
2. The parties agree that, under section 48 of the *Act*, the transaction value should be used to ascertain the value for duty. The transaction value is determined by taking the price paid or payable for the imported goods (i.e. their “pre-adjustment value”) and making the adjustments required by the *Act*.
3. The first issue in this appeal is the determination of which transaction constitutes the sale for export within the meaning of subsection 48(1) of the *Act*.
4. Pampered Chef Canada claims that the relevant transaction is the related-company transfer from Pampered Chef U.S.A. to Pampered Chef Canada at a constructed price. The CBSA determined that the appropriate transaction is the sale from Pampered Chef U.S.A. to its independent sales consultants in Canada at full consumer price.
5. The second issue is whether commissions paid to the consultants should be added to the pre-adjustment value, under subsection 48(5) of the *Act*.

FACTS

6. In addition to the documentary evidence on the record, the Canadian International Trade Tribunal (the Tribunal) heard testimony from Ms. Janice Gerol, Vice-president and General Manager of Pampered Chef Canada; Ms. Roxann Ruiz, Director of Accounting for Pampered Chef U.S.A.; and Mr. David A. Fyfe, a retired CBSA recourse officer familiar with the history of the CBSA’s dealings with the Pampered Chef companies. The Tribunal also examined certain physical exhibits. Based on its assessment of the evidence, the Tribunal reached the factual conclusions outlined in the following paragraphs.

Procedural History

7. On May 6, 1999, the CBSA issued a national customs ruling to Pampered Chef U.S.A. The ruling held that Pampered Chef Canada did not qualify as a purchaser in Canada under the *Valuation for Duty Regulations*² and that the sale for export to Canada was between Pampered Chef U.S.A. and individual customers located in Canada. Consequently, the transaction value had to be the price of the sale to the customer plus or minus the adjustments required under the *Act*.³
8. On April 18, 2005, Pampered Chef Canada appealed the national customs ruling through the CBSA’s internal appeal process.⁴
9. On September 27, 2006, the CBSA made its final determination and found that: (a) Pampered Chef Canada did not qualify as a “purchaser in Canada” under the *Regulations*; and (b) the relevant sale for valuation purposes was the sale between Pampered Chef U.S.A. and the independent sales consultants located in Canada.⁵

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.O.R./86-792 [*Regulations*].

3. Respondent’s confidential brief, tab 1.

4. Respondent’s public brief, at para. 11.

5. Respondent’s confidential brief, tab 7.

10. On December 20, 2006, Pampered Chef Canada appealed the CBSA's decision to the Tribunal.

Explanation of Transactions

11. The following paragraphs explain the sales transaction between Pampered Chef Canada and the customer and the intercompany transfer between Pampered Chef U.S.A. and Pampered Chef Canada.

12. In the case of the latter transaction, the transfer is part of an elaborate, complex intercompany arrangement. According to the witnesses for the Pampered Chef companies, this arrangement has never been formalized in writing. However, no evidence was tendered to suggest that it was other than as described by the witnesses.

13. As further explained in the next paragraph, Pampered Chef U.S.A. is a multilevel marketing company that deals in kitchen products by selling them at home parties through independent sales consultants.⁶ The format for a home show is the following: after finding someone to host and arrange the show, the consultant arrives at the host's home on the appointed day, visits with the guests, hands out individual order forms and then demonstrates Pampered Chef products. Guests may purchase some articles of the product line before the end of the evening.⁷

14. The consultant is paid on the basis of commissions, bonuses and overrides⁸ by Pampered Chef Canada. The payment is effected through the accounting services of Pampered Chef U.S.A. The average commission is approximately 25 percent of the consumer price of the goods.⁹ *Future director* consultants are, in addition, paid a percentage of the team sales commissions, i.e. sales made by consultants they have signed to the Pampered Chef organization. *Director* consultants are, in addition, paid a percentage of sales made by the future director consultants under them and of the team sales commissions of the future director consultants. Similar percentage payments on sales by *downlink* directors and teams apply to the levels above that of director, i.e. advanced director and senior director. However, no individual is allowed to receive commissions on more than three levels of sales, not including his or her own.¹⁰

15. The process for purchasing a Pampered Chef product is as follows: the guest fills out an order form, and pays the list price of the desired article, all relevant taxes and a \$5 shipping fee.¹¹ Although payment may be made by cash or cheque, about half of all purchases are made by credit card.¹² At the end of the show, the consultant consolidates the orders and sends, to the Canadian support services centre of Pampered Chef U.S.A., a "show order form"¹³ that contains the orders for the entire show, all credit card receipts and his or her own Pampered Chef Canada debit card information.¹⁴

16. Pampered Chef Canada receives payment either by claiming against the credit card account listed on the consolidated order form or by debiting the consultant's bank account for payments in the form of cash or cheque.¹⁵ Sales consultants are required to equip themselves with a Pampered Chef Canada

6. *Transcript of Public Hearing*, 26 and 27 September 2007 at 121.

7. *Ibid.* at 29-31.

8. *Ibid.* at 69, 142.

9. *Ibid.* at 142.

10. *Ibid.* at 94-96.

11. Appellant's brief, tab 5.

12. *Transcript of Public Hearing*, 26 and 27 September 2007 at 37.

13. Appellant's brief, tab 6.

14. *Transcript of Public Hearing*, 26 and 27 September 2007 at 38-40.

15. *Ibid.* at 109.

“proprietary” debit card for this purpose.¹⁶ If a credit card is declined or an NSF cheque is presented for payment, rather than hold up the whole order, Pampered Chef Canada will cover the shortfall and look to the consultant and/or the customer for reimbursement afterwards.¹⁷

17. The computer system then sends an order fulfillment request to the Pampered Chef U.S.A.’s warehouse where staff pick the purchased items from inventory and packs them on a truck for shipment to Canada. Invoices for all shipments are “rolled up” monthly and the cost is billed to Pampered Chef Canada for payment through a “monthly departmental report”,¹⁸ also called a “transfer price invoice”.¹⁹

18. The process for order fulfillment is the following: paper orders are keyed into electronic format by the Pampered Chef Canada support services centre, a discrete call centre and order-processing department within Pampered Chef U.S.A., the cost of which is billed back to Pampered Chef Canada.²⁰ The computer system then confirms whether or not payment for the order has been received and, if so, routes the payment to Pampered Chef Canada’s bank account.²¹

19. The monthly invoice is divided into two parts:

- a) the *product cost* portion contains a pass-through of the cost that Pampered Chef U.S.A. incurred for the purchase of the item from its supplier (plus a very small markup);²² and
- b) the *transfer price* portion contains a markup over the cost of goods for all outsourced services that cannot be directly captured and billed to Pampered Chef Canada (such as accounting and order fulfillment) plus a small profit margin. A study by PricewaterhouseCoopers, in which the accountancy firm derived (for corporate income tax purposes) a formula for the allocation of the cost of outsourced services back to Pampered Chef Canada,²³ provides the basis for the transfer price.

20. The total monthly invoice amounts are reflected in Pampered Chef Canada’s annual financial statements. In its income statement, the cost of goods sold is the sum of the product cost portions of the monthly invoices, and the transfer pricing entry is the sum of the transfer price portions of the individual invoices. (The monthly support services centre costs are shown as “payroll Canadian support services”.) On Pampered Chef Canada’s balance sheet, profit is recognized as retained earnings or stockholders’ equity.²⁴ Goods in transit that were purchased by Pampered Chef Canada, but not yet delivered to the customer, are shown as an asset on the balance sheet under “inventory deferred cost of sales”.²⁵

16. *Ibid.* at 129.

17. *Ibid.* at 111-12, 167.

18. *Ibid.* at 124, 141; appellant’s brief, tab 24L (confidential exhibit).

19. *Transcript of Public Hearing*, 26 and 27 September 2007 at 134.

20. *Ibid.* at 100.

21. *Ibid.* at 43, 54, 129, 189.

22. *Ibid.* at 183.

23. *Ibid.* at 198.

24. *Ibid.* at 140-51.

25. *Ibid.* at 170.

21. Pampered Chef U.S.A. does not wait for payment from Pampered Chef Canada before shipping the goods.²⁶ Rather, it relies on actual knowledge of the money being in Pampered Chef Canada's bank account and considers any risk of non-payment to be minimal. On occasion, Pampered Chef Canada will have partly prepaid for goods for the following year.²⁷

22. Pampered Chef Canada is responsible for customs charges and bears the risk of damage, loss, non-delivery, returns, warranties and product liability once the purchased items are loaded onto a truck at Pampered Chef U.S.A.'s warehouse.²⁸

23. Pampered Chef U.S.A.'s shipper, UPS, delivers the order to the Canadian UPS hub. The shipper then clears the goods through customs and delivers them to the show host, who is responsible for delivering individual orders to the various guest-customers.²⁹ Pampered Chef Canada pays all customs and freight costs incurred.³⁰ Only when the host delivers the purchased item to the customer does Pampered Chef Canada book the payment as revenue on its ledger.³¹

LAW

24. Subsection 45(1) of the *Act* states the following: "In this section and sections 46 to 55, . . . 'purchaser in Canada' has the meaning assigned by the regulations . . ."

25. Section 2.1 of the *Regulations* states that, "[f]or the purposes of subsection 45(1) of the Act, 'purchaser in Canada' means (a) a resident; (b) a person who is not a resident but who has a permanent establishment in Canada . . ."

26. Section 2 of the *Regulations* defines "permanent establishment" as ". . . a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business."

27. Section 48 of the *Act* reads as follows:

(1) Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined . . .

(4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(a) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to

(i) commissions and brokerage in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale . . .

26. *Ibid.* at 192.

27. *Ibid.* at 158.

28. *Ibid.* at 89, 159-61, 164, 172-74, 193.

29. *Ibid.* at 131.

30. *Ibid.* at 132, 178.

31. *Ibid.* at 194-96.

ANALYSIS

28. Four questions need to be answered in order for the transaction value method, referred to in subsection 48(1) of the *Act*, to be used:

- What is the sale for export to Canada?
- Who is the purchaser in Canada?
- Can the price paid or payable be determined?
- What adjustments should be made to the price paid or payable?

What Is the Sale for Export to Canada?

29. Both parties agree that the sale for export is the sale from Pampered Chef U.S.A. ex warehouse in the United States, but to whom? The Tribunal finds that the sale for export is to Pampered Chef Canada.

30. The Supreme Court of Canada, in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, stated the following: “. . . the relevant sale for export is the sale by which title to the goods passes to the importer. The importer is the party who has title to the goods at the time the goods are transported into Canada. . . .”³²

31. Pampered Chef Canada argues that title to the goods passes from Pampered Chef U.S.A. to Pampered Chef Canada when they leave the warehouse in the United States. According to Ms. Ruiz, it is from this moment on that Pampered Chef Canada bears all risks relating to the goods.

32. The Tribunal notes that, in its appeal of the national customs ruling to the CBSA, Pampered Chef Canada submitted that “. . . title is transferred to [Pampered Chef Canada] at [Pampered Chef U.S.A.’s] distribution center in Addison, IL. . . .”³³ The 2004 financial statements of Pampered Chef Canada³⁴ show entries in the income statement for the payment of freight to UPS and for customs duties. Pampered Chef Canada’s 2004 monthly departmental report³⁵ also shows an item, “41200 Freight Out - UPS”, which represents claims by the support services centre against UPS for lost shipments.

33. The CBSA contends that the sale for export is between Pampered Chef U.S.A. and the consultant. It argues that the consultant is present at the show, collects the orders, consolidates them, collects the money and forwards the consolidated orders to Pampered Chef U.S.A. The consultant is also responsible for the collection of bad debts.

34. Pampered Chef Canada contends that there is no contract of sale between Pampered Chef U.S.A. and the consultant. Rather, the only contract of sale is between the end customer and Pampered Chef Canada.

35. On balance, the Tribunal is convinced that the sale for export is the sale from Pampered Chef U.S.A. to Pampered Chef Canada. The role played by the consultant is that of a facilitator, for which he or she is paid a commission, not that of one who buys the imported goods on his or her own account and then resells them for a profit later.

32. [2001] 2 S.C.R. 100 at 121.

33. Respondent’s confidential brief, tab 2 at 2.

34. Tribunal Exhibit AP 2006-048-24N (protected).

35. Tribunal Exhibit AP-2006-048-24L (protected).

36. The Tribunal is of the view that title passes from Pampered Chef U.S.A. to Pampered Chef Canada ex Pampered Chef U.S.A.'s warehouse rather than to the consultant. Key evidence leading to this conclusion is the uncontradicted testimony of the witnesses for the Pampered Chef companies to the effect that Pampered Chef Canada is responsible for customs charges and bears the risk of damage, loss, non-delivery, returns, warranties and product liability once the purchased items are loaded onto a truck at the Pampered Chef U.S.A.'s warehouse.

37. The Tribunal acknowledges that the evidence indicates that the consultants had some degree of responsibility for bad debts.³⁶ However, Ms. Gerol stated that there are rarely bad debts, but that, if any did arise, Pampered Chef Canada would get involved and clear the matter up so as not to delay an order. The 2004 income statement for Pampered Chef Canada shows a provision for bad debts in the amount of \$4,567, a tiny percentage of its sales of approximately \$31 million.

38. The CBSA relies on the PricewaterhouseCoopers study in an attempt to refute the testimony of the two witnesses for the Pampered Chef companies. The Tribunal does not give the study much weight, because it was prepared for another purpose and predates the national customs ruling by two years. In addition, on some critical issues, such as the extent of Pampered Chef Canada's liability for product and distribution risks, the witnesses for the Pampered Chef companies flatly contradicted the study.³⁷ In any event, the report itself appeared to contemplate a transfer of title from Pampered Chef U.S.A. to Pampered Chef Canada "... [i]n order to establish the appropriate arm's length return for the transfer of tangible property ...".³⁸

Who Is the Purchaser in Canada?

39. The Tribunal finds that Pampered Chef Canada meets the test of a purchaser in Canada. As stated above, in the *Regulations*, "... 'purchaser in Canada' means (a) a resident; (b) a person who is not a resident but who has a permanent establishment in Canada ...".

40. Pampered Chef Canada conceded that it does not qualify as a resident within the meaning of the *Regulations*, since the term implies the existence of management and control within Canada. However, it argued that the premises of Pampered Chef Canada *do* qualify as a "permanent establishment", which is defined as "... a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business." Pampered Chef Canada has an office in Ontario, employees, a warehouse and bank accounts, and can be said to manage its operations from those premises.

41. The Federal Court of Appeal established the test for "carrying on business" in Canada as follows: Is the company buying and selling goods on its own account for a profit in Canada?³⁹ In this appeal, Pampered Chef Canada sells goods to customers in Canada, as evidenced by order forms used at the parties and by payments that are either sent to Pampered Chef Canada directly or deposited by the consultant in an account to which the company has access. It is also clear, in the Tribunal's opinion, that Pampered Chef Canada buys goods from Pampered Chef U.S.A., which it resells in Canada for profit.

36. *Transcript of Public Hearing*, 26 and 27 September 2007 at 310-11.

37. *Ibid.* at 159-66.

38. Respondent's confidential brief, tab 9 at 1.

39. *AAi.FosterGrant of Canada Co. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*, 2004 FCA 259 (CanLII), at para. 18.

42. Moreover, the CBSA conceded that, if the sale for export was from Pampered Chef U.S.A. to Pampered Chef Canada, the latter would meet the test for “carrying on business” in Canada.⁴⁰

Can the Price Paid or Payable Be Determined?

43. This matter was not in issue, and the Tribunal finds that the price paid or payable can be determined. It seems clear that the price paid for the goods should be the invoiced price, as evidenced in the monthly report.⁴¹ This invoiced price includes the cost of goods sold and the transfer price of the goods, which Ms. Ruiz stated was a heading that covered all unallocated costs associated with the related-company sale of the goods.

What Adjustments Should Be Made to the Price Paid or Payable?

44. The final issue to be resolved is whether the commission paid to the consultant should be added to the invoiced value of the goods. The Tribunal is of the view that it should not be added.

45. Subsection 48(5) of the *Act* requires that any commissions incurred by the purchaser in respect of the goods must be added to the pre-adjustment value “. . . to the extent that each such amount is not already included in the price paid or payable for the goods . . .” In the Tribunal’s opinion, the context makes clear that this requirement relates to the sale for export, i.e. the related-company transfer, not some subsequent sale within Canada.

46. The evidence shows that Pampered Chef Canada pays the commissions to the consultants for their services in facilitating the sale of the goods to the customer in Canada. The consultant recruits the host, arranges for the show in the host’s home, gives a demonstration of the goods, takes orders for goods on behalf of Pampered Chef Canada and deposits the proceeds or sends the proceeds to Pampered Chef Canada. These services are not related to the sale between Pampered Chef U.S.A. and Pampered Chef Canada.

CONCLUSION

47. For the above reasons, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

40. *Transcript of Public Hearing*, 26 and 27 September 2007 at 317.

41. Tribunal Exhibit AP-2006-048-8B (protected).